

# National Labor Relations Board



## Weekly Summary of NLRB Cases

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CASES SUMMARIZED  
VISIT [WWW.NLRB.GOV](http://WWW.NLRB.GOV) FULL TEXT

<a href="#">Abramson, LLC</a>	Birmingham, AL	2
<a href="#">A.J. Mechanical, Inc., et al.</a>	Pensacola, FL	2
<a href="#">Aljoma Lumber, Inc.</a>	Ponce, PR	3
<a href="#">Berkshire Nursing Home</a>	West Babylon, NY	4
<a href="#">Carroll College, Inc.</a>	Waukesha, WI	5
<a href="#">Diamond Detective Agency, Inc.</a>	Tampa, FL	5
<a href="#">Flying Foods.</a>	Miami, FL	6
<a href="#">Hotel Del Coronado</a>	Coronado, CA	6
<a href="#">Krystal Enterprises, Inc.</a>	Brea, CA	7
<a href="#">Randell Manufacturing of Arizona, Inc.</a>	Tucson, AZ	8
<a href="#">Richmond Times-Dispatch</a>	Richmond, VA	9
<a href="#">Service Employees Local 1877</a>	San Francisco, CA	9
<a href="#">675 West End Owners Corp.</a>	New York, NY	1
<a href="#">Stanadyne Automotive Corp.</a>	Windsor, CT	10

<a href="#">TNT Logistics North America, Inc.</a>	Southfield, MI	11
<a href="#">United States Postal Service</a>	Waco, TX	12
<a href="#">Utility Vault Co.</a>	Fontana, CA	13
<a href="#">Werthan Packaging, Inc.</a>	Nashville, TN	13
<a href="#">Zurn/N.E.P.C.O.</a>	Cadillac, MI	15

OTHER CONTENTS

<a href="#">List of Decisions of Administrative Law Judges</a>	16
<a href="#">No Answer to Compliant Case</a>	17
<a href="#">No Answer to Compliance Specification Case</a>	17
<a href="#">Test of Certification Cases</a>	17
<a href="#">List of Unpublished Board Decisions and Orders in Representation Cases</a>	17

- Contested Reports of Regional Directors and Hearing Officers
- Requests for Review of Regional Directors' Decisions and Directions of Elections and Decisions and Orders
- Miscellaneous Board Orders

Press Releases ([R-2566](#)): NLRB Will Issue Cases With Two-Member Quorum After Member Schaumber Departs

([R-2567](#)): NLRB and EEOC Renew Partnership to Recruit Diverse Pool of Talented Attorneys

([R-2568](#)): NLRB New Orleans, LA Office Temporarily Closed Due to Hurricane Katrina

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*675 West End Owners Corp., et al.* (2-CA-33940, et al.; 345 NLRB No. 27) New York, NY Aug. 26, 2005. The Board affirmed the administrative law judge's findings that the Respondents violated Section 8(a)(5) of the Act by hiring a security guard company to perform bargaining unit work without prior notice to and bargaining with Stationary Engineers, Firemen, Maintenance and Building Service Union Local 670, refusing to meet and negotiate with the Union on the matter, and refusing to provide information to the Union. [\[HTML\]](#) [\[PDF\]](#)

The judge found, with Board approval, that the Respondents' ownership and management companies are each a single employer and together are joint employers, and that the Respondents' argument that the Board in its earlier representation case did not properly certify the Union is meritless. The Board also found that the judge did not abuse her discretion in dismissing the Respondents' other procedural arguments.

The Board agreed with the judge that a hearing should be held to determine the litigation costs expended by the Union and the General Counsel as a result of Respondent Uzi Einy's willful violation of the judge's instructions regarding subpoenas. Chairman Battista would not award litigation costs assertedly incurred because of the Respondent's counsel's alleged disobedience of the judge's instructions. He noted that the misconduct was a discrete event, viz an alleged failure to follow specific instructions from the judge. "If the allegation is true, it is cognizable under Sec. 102.177 of the Rule, as is the other alleged misconduct by counsel in this case," the Chairman explained.

The Board did not adopt the judge's recommendation that it warn and reprimand Einy for his conduct during the hearing. The judge recommended that the Board warn Einy for evading and delaying Board processes by refusing certified mail, and reprimand him for submitting an essentially groundless answer on the Respondents' behalf and failing to follow her instructions during the hearing. The Board said the judge's recommendation did not comport with Section 102.177(e) of the Board's Rules and Regulations, explaining: "Apart from the authority of a judge to reprimand or admonish for conduct during the course of a hearing, Section 102.177(e) sets out a delineated procedure for the investigation and institution of disciplinary procedures designed to ensure that allegations of misconduct will be handled according to established procedures with appropriate due process safeguards."

The Board noted also that under Section 102.177(b), the judge had the authority to reprimand or admonish Einy for his conduct during the hearing, but failed to do so. Accordingly, it referred the judge's recommendation to the investigating officer [the Associate General Counsel, Division of Operations-Management] under Section 102.177(e), with whom the judge should have filed her recommendation.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Stationary Engineers, Firemen, Maintenance and Building Service Union Local 670, RWDSU, UFCW; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York, June 3-7, 2002. Adm. Law Judge Eleanor MacDonald issued her decision Dec. 27, 2002.

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*Abramson, LLC* (10-CA-33153, 33368, 10-RC-15230; 345 NLRB No. 8) Birmingham, AL Aug. 26, 2005. The Board affirmed in part and reversed in part, the administrative law judge's numerous unfair labor practice findings. The judge found that the Respondent's unfair labor practices so tainted the workplace atmosphere that the possibility of assuring a fair rerun election was slight, and recommended that the Respondent be ordered to bargain with Carpenters Local 127 pursuant to *NLRB v. Gissel Packaging Co.*, 395 U.S. 575 (1969). [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber found that the coercive effects of the Respondent's unlawful conduct can be alleviated and a fair rerun election held by use of the Board's traditional remedies. Accordingly, they reversed the judge and directed a second election. Dissenting in part, Member Liebman would affirm all of the judge's findings that her colleagues reversed. She wrote: "[T]he Respondent's unfair labor practices make it unlikely that a fair election can be held. Accordingly, I would adopt the judge's recommended *Gissel* bargaining order. I would similarly adopt the judge's finding that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union and by unilaterally laying off employees."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Carpenters Local 127 and Curtis Young, an Individual; complaint alleged violation of Section 8(a)(1), (3), (4), and (5). Hearing at Birmingham, March 11-13 and 15, 2002. Adm. Law Judge Lawrence W. Cullen issued his decision July 8, 2002.

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*A.J. Mechanical, Inc., et al.* (15-CA-15350, et al.; 345 NLRB No. 22) Pensacola, FL Aug. 26, 2005. Chairman Battista and Member Schaumber, with Member Liebman dissenting, dismissed the compliance specification insofar as it alleges that the Respondent's co-owner, William A. (Arnold) Greene, and his wife, Cynthia D. Greene, should be held personally liable for the backpay due employees who suffered financial consequences as a result of the unfair labor practices of the now-defunct Respondent A.J. Mechanical, Inc. [\[HTML\]](#) [\[PDF\]](#)

The General Counsel is seeking to satisfy the backpay that A.J. Mechanical owes the discriminatees based on its unfair labor practices by "piercing the corporate veil" of A.J. Mechanical and attaching the backpay obligation to the Greenes because A.J. Mechanical ceased operations prior to the Board's 2000 Order (330 NLRB No. 178) in the underlying proceeding.

Applying *White Oak Coal*, 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4<sup>th</sup> Cir. 1996), the judge found that Arnold Greene failed to maintain a legal identity separate from A.J. Mechanical and adherence to the corporate shield would unjustly result in the evasion of the defunct A.J. Mechanical's backpay obligations incurred through unfair labor practices that the Respondent, through Arnold Greene and others, committed. He reviewed the distribution of A.J. Mechanical's assets through payments to shareholders Arnold Greene and James Sanders from Feb. though Dec. 1999 and found that Arnold and Cynthia Greene, as husband and wife, shared

equally in the proceeds of A.J. Mechanical and that Cynthia Greene, who was neither an officer nor shareholder of A.J. Mechanical, likewise was jointly and severally responsible for A.J. Mechanical's remedial backpay obligations.

Chairman Battista and Member Schaumber disagreed. They accepted *arguendo*, for the purposes of this decision, the judge's conclusion that the General Counsel presented evidence sufficient to establish that the separate identity of A.J. Mechanical had not been maintained under the first prong of the *White Oak Coal* standard. Contrary to the judge, the majority found however that the evidence falls short of satisfying the second prong of that standard. They observed that the timing of the corporate distribution does not support the judge's conclusion that adherence to the corporate form would lead to the evasion of legal obligations, noting that the bulk of the assets were paid out before Arnold Greene had any notice that the Respondent might be facing future liability. The majority wrote: "The post-charge, postcomplaint payments were simply a continuation and completion of a process that had begun before those dates. Consistent with that chronology, the General Counsel does not even allege, and the evidence does not establish, that this process and these payments were unlawful."

Member Liebman, in her dissent, said: "This is a textbook case for piercing the corporate veil to prevent injustice. . . . My colleagues justify their decision by pointing out that the process of draining funds from the Company began before unfair labor practice charges actually were filed. What they gloss over, however, is that the process was clearly part of a strategy to defeat the Union and the Board's remedies—as the owner essentially told the Board. If that were not enough, the evidence establishes: (1) that most of the backpay owed to employees stems from the Company's shutdown *after* the Union was certified and the Company unlawfully refused to bargain with it; and (2) that the funds distributed to the owner after the first unfair labor practice charge was filed exceed the monetary liability involved. That the Board would sanction the result here is incomprehensible."

(Chairman Battista and Members Liebman and Schaumber participated.)

Hearing at Pensacola on Oct. 30, 2002. Adm. Law Judge Pargen Robertson issued his supplemental decision Jan. 23, 2003.

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*Aljoma Lumber, Inc.* (24-CA-8750, et al.; 345 NLRB No. 19) Ponce, PR Aug. 26, 2005. The Board agreed with the administrative law judge, in all respects except one, that the Respondent violated Section 8(a)(1), (3), and (5) of the Act in response to a union organizing effort by some of its production and maintenance employees in late 2000 and following the certification of Uniones Industriales de Puerto Rico as its employees' exclusive collective-bargaining representative in early 2001. [\[HTML\]](#) [\[PDF\]](#)

The reversal concerns the judge's finding that, in or around February 2001, after the Union had been certified, the Respondent violated Section 8(a)(5) and (1) by unilaterally

changing employees' work hours without notifying the Union or bargaining with the union. The judge rejected the Respondent's affirmative defense that this complaint allegation was time-barred under Section 10(b) on the grounds that the defense was untimely raised.

The Board dismissed this complaint allegation, finding, contrary to the judge, that the Respondent timely raised the 10(b) defense. It also found that the underlying complaint allegation was time-barred under Section 10(b).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Congreso de Uniones Industriales de Puerto Rico; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Hato Rey, April 8-12 and June 5, 2002. Adm. Law Judge George Alemán issued his decision Nov. 29, 2002.

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*Berkshire Nursing Home, LLC* (29-CA-26082; 345 NLRB No. 14) West Babylon, NY Aug. 26, 2005. The Board affirmed the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing new health care plans or increasing the costs of the existing plan without bargaining with New York's Health & Human Service 1199 SEIU, and refusing to bargain with the Union regarding available health care plans or employees' contributions under these health care plans. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber, citing *Crittendon Hospital*, 342 NLRB No. 67, slip op. at 1 (2004), stated that a unilateral change with regard to a mandatory subject of bargaining violates Section 8(a)(5) and (1) only if the change is a "material, substantial, and significant" one. They disagreed with the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) when it unilaterally changed employees' parking locations. The majority did not find the Respondent's changes in employee parking policies to be "material, substantial, and significant."

Dissenting in part, Member Liebman would affirm the judge's conclusion that the Respondent violated the Act when it unilaterally changed employee' parking locations. She wrote that the Respondent's unilateral change in employees' parking options could reasonably lead to the sort of labor dispute that the Act seeks to prevent by requiring collective bargaining. Contrary to the majority, she concluded that the Respondent's unilateral changes to its employee parking policy were unlawful.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by New York's Health & Human Service 1199 SEIU; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn on Oct. 19, 2004. Adm. Law Judge Joel P. Biblowitz issued his decision Dec. 21, 2004.

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*Carroll College, Inc.* (30-RC-6594; 345 NLRB No. 17) Waukesha, WI August 26, 2005. The Board considered whether the Employer, a private liberal arts college “affiliated” with the Presbyterian Church that expressly concedes that it is an employer within the meaning of Section 2(2) of the Act, is nevertheless exempt from application of the Act by virtue of the Religious Freedom Restoration Act (RFRA). After independently considering the Employer’s RFRA claim, the Board found that the Employer has not shown that application of the Act will substantially burden its ability to freely exercise its sincere religious beliefs in any way. Accordingly, it affirmed the Acting Regional Director’s decision and direction of election and remanded the proceeding to the Regional Director for further appropriate action. [\[HTML\]](#) [\[PDF\]](#)

The UAW is seeking to represent a unit of all full-time and regular part-time tenured and non-tenured teaching faculty employed by the College. Applying *University of Great Falls*, 331 NLRB 1663 (2000), enfd. denied 278 F.3d 1335 (D.C. Cir. 2002), where the Board stated that RFRA does not require the Board to alter the analysis that it has consistently undertaken under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), in determining whether the assertion of jurisdiction over an employer would involve a significant infringement of First Amendment rights, the Acting Regional Director found that asserting jurisdiction over the Employer would not violate the First Amendment. He found it unnecessary to address the Employer’s RFRA claim. The Board in May 2005 granted the Employer’s request for review of the Acting Regional Director’s decision solely with respect to his application of the RFRA.

The Board wrote in announcing its revised approach: “We accept the D.C. Circuit’s analysis that a ruling that an entity is not exempt from Board jurisdiction under *Catholic Bishop* does not automatically foreclose a RFRA claim that requiring that entity to engage in collective bargaining would ‘substantially burden’ its exercise of religion. Accordingly, we disavow the Board’s decision in *University of Great Falls* to the extent that it can be read to conflate the analysis of a RFRA claim with analysis of a *Catholic Bishop* jurisdictional exemption claim. If a party brings a RFRA claim before the Board, we will analyze it independently of any *Catholic Bishop* exemption claim.”

(Chairman Battista and Members Liebman and Schaumber participated.)

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*Diamond Detective Agency, Inc.* (12-CA-24119; 345 NLRB No. 16) Tampa, FL Aug. 25, 2005. The Board granted the Acting General Counsel’s motion for summary judgment based on the Respondent’s amended answer admitting all of the allegations of the complaint. It found that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge employees if they engaged in activities on behalf of Government Security Officers Local 200 and violated Section 8(a)(1) and (3) by suspending and discharging employee Douglas Miller because he joined, supported, and assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Schaumber participated.)

Acting General Counsel filed motion for summary judgment July 11, 2005.

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*Flying Foods Group, Inc. d/b/a Flying Foods* (12-CA-21462, et al.; 345 NLRB No. 10) Miami, FL Aug. 25, 2005. The administrative law judge found that the Respondent committed numerous violations of the Act. Among others, the Board adopted his finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Hotel & Restaurant Employees Local 355 and by making subsequent unilateral changes in employees' terms and conditions of employment, and violated Section 8(a)(3) by its unilateral wage increase. It also agreed that the Respondent committed several violations of Section 8(a)(1). [\[HTML\]](#) [\[PDF\]](#)

Contrary to the judge, Chairman Battista and Member Schaumber dismissed the complaint allegations that the Respondent violated Section 8(a)(1) by failing to make a wage proposal during the negotiating sessions on January 31 and March 28, 2001, by soliciting employees to sign a disaffection petition, or by showing its new employees a video informing them of their choice not to sign a union authorization card; and the allegations that the Respondent violated Section 8(a)(5) and (1) by failing to bargain in good faith with the Union between January 31 and April 18, 2001.

Member Liebman, dissenting in part, would find that the Respondent violated Section 8(a)(1) by soliciting its employees to decertify the Union by showing them the antiunion video in question. In all other respects, she agreed with the results reached by her colleagues.

No exceptions were filed to the judge's dismissals of the allegations that the Respondent violated Section 8(a)(3) and (1) by disciplining employee Luis Hurtado and violated Section 8(a)(1) by: (1) threatening employees with discharge if they contacted the Union or the Board about disciplinary issues; (2) threatening, through employee Dario Mazier, to withhold wage increases from employees; (3) promising, through Mazier, a wage increase if employees decertified the Union; (4) informing employees, through Supervisor Rene Largaespada, that a wage increase was a reward for decertifying the Union and that the Union was replaced with an employer group; and (5) threatening employees, through Supervisor Nelson Nunez, with discharge for their support of the Union.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Hotel & Restaurant Employees Local 355; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Miami, March 18-22, May 6-10, and June 10-13, 2002. Adm. Law Judge John H. West issued his decision Sept. 24, 2002.

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*KSL DC Management, LLC d/b/a Hotel Del Coronado* (21-CA-36119, 36195; 345 NLRB No. 24) Coronado, CA Aug. 26, 2005. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Hotel Employees and Restaurant Employees Local 30 as the exclusive

representative of a unit of elevator operators, storeroom specialists, spa attendants and facilities employees; and violated Section 8(a)(3) and (1) by temporarily demoting Joel Martinez from server to busboy on Dec. 21, 2003. [\[HTML\]](#) [\[PDF\]](#)

The Respondent, KSL Management, LLC, operates the Hotel de Coronado. It purchased the hotel from Destination Coronado Hotel, Inc., the predecessor employer, on Dec. 18, 2003. The predecessor employer and the Union were parties to a collective-bargaining agreement, effective 2000-2005, that covered hotel culinary, stewarding, dining, convention services, housekeeping, and banquet employees. On Sept. 26, 2001, the predecessor employer and the Union entered into a neutrality agreement that governed the parties' conduct during any subsequent union organizing drives at the hotel.

The Union began organizing some unrepresented hotel employees in Sept. 2003. At that time, it represented two units of hotel employees. On Oct. 6, 2003, the Union filed a representation petition seeking an election in a unit of the predecessor employer's elevator operators, storeroom specialists, spa attendants, and facilities employees. The predecessor employer and the Union entered into a stipulated election agreement for the unit on Oct. 9, 2003. The Union won the Board-conducted election held on Oct. 30, 2003 and was certified as the exclusive bargaining representative of the unit on Nov. 7, 2003.

The Respondent recognized the Union as representative of the employees in the two units covered by the predecessor's contract, but it refused to recognize the Union as the representative of employees in the newly certified unit. In defense, it argued that: (1) the certified unit is not appropriate; (2) the voters in the election had no reasonable expectation of continued employment at the time of the election (because the predecessor informed them on Oct. 17 that it would terminate them); and (3) the predecessor and the Union tainted the election by entering into an unlawful neutrality agreement. The Board rejected those arguments.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Hotel Employees and Restaurant Employees Local 30, complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at San Diego, July 19-21, 2004. Adm. Law Judge Lana H. Parke issued her decision Sept. 13, 2004.

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*Krystal Enterprises, Inc.* (21-CA-34553, 34875; 345 NLRB No. 15) Brea, CA Aug. 26, 2005. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by: threatening to retaliate against employees for engaging in union activities; interrogating employees about their and other employees' union activities; creating the impression that employees' union activities were under surveillance; denying employees access to union representatives during a union rally; and promulgating and maintaining an overly broad no-solicitation, no distribution rule. [\[HTML\]](#) [\[PDF\]](#)

It also agreed with the judge that the Respondent violated Section 8(a)(3) and (1) by disciplining and suspending Ricardo Romero for engaging in union activities and by reducing the work duties of Olga Lopez based on the Respondent's belief that she was engaging in union activities.

In a reversal of the judge, Chairman Battista and Member Schaumber found that the Respondent did not violate Section 8(a)(3) and (1) by discharging Romero and laying off Lopez. They found that the Respondent satisfied its rebuttal burden under *Wright Line* of establishing that it would have discharged Romero based on his violations of the Respondent's sexual harassment policy even in the absence of his union activities and that it would have included Lopez in its 20-percent work force reduction even in the absence of her perceived union activities.

Member Liebman, dissenting in part, said the Respondent "targeted" Romero and Lopez "for phony discipline or other punishment, and ended up discriminatorily terminating both of them." She wrote: "Romero was discharged because he was a union activist (and not because he engaged in sexual horseplay, which was rampant—and tolerated—in the workplace here). Lopez was laid off because the Respondent suspected that she was the cousin of a union activist and that she was aiding the Union's organizational campaign (and not for economic reasons, which had evaporated)."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Food and Commercial Workers Local 324; complaint alleged violation of Section 8(a)(3) and (1). Hearing at Los Angeles, Feb. 25 – March 1, March 18-21, and March 25-28, 2002. Adm. Law Judge John J. McCarrick issued his decision Aug. 1, 2002.

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*Randell Manufacturing of Arizona, Inc.* (28-CA-16207, 16322; 345 NLRB No. 12) Tucson, AZ Aug. 26, 2005. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by terminating Luz del Carmen Perez for engaging in protected, concerted activity when she circulated a petition requesting the removal of her supervisor, Ismael Garcia. There were no exceptions to the judge's dismissal of the allegation that Perez' discharge also violated Section 8(a)(3). It agreed with the judge that the complaint allegations of unlawful solicitation of grievances and threat of replacement are time barred by Section 10(b). [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Sheet Metal Workers Local 359; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Tucson, Aug 22-24, and Oct. 5, 2000. Adm. Law Judge James M. Kennedy issued his decision June 5, 2001.

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*Media General Operations, Inc., d/b/a Richmond Times-Dispatch* (5-CA-29907; 345 NLRB No. 11) Richmond, VA Aug. 26, 2005. Chairman Battista and Member Schaumber found, contrary to dissenting Member Liebman, that the administrative law judge's findings are well supported by the facts of this case and by Board precedent, and affirmed his dismissal of the complaint alleging that the Respondent violated Section 8(a)(5) of the Act by unilaterally terminating an annual Christmas/holiday bonus and refusing the Union's requests for financial information relating to the proposed termination. [\[HTML\]](#) [\[PDF\]](#)

Dissenting Member Liebman would find the violations as alleged. She noted that the Respondent had paid its employees an annual bonus since 1960 when it cancelled the bonus unilaterally in 2001. And, contrary to the judge's finding, the Union did not waive its right to bargain by conditioning bargaining on receipt of financial information. Member Liebman wrote: "The Respondent never gave the Union an opportunity to bargain about the bonus cancellation, so it violated the Act whether or not the Union was entitled to the requested information. In any case, the Union was entitled to the information, and the Respondent violated Section 8(a)(5) by refusing to furnish it. The Respondent expressly claimed inability to pay, and it did not retract that claim."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Graphic Communications Local 40-N; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Richmond, March 25-26, 2002. Adm. Law Judge Bruce D. Rosenstein issued his decision June 4, 2002.

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*Service Employees Local 1877, Division 87* (20-CB-11894, et al.; 345 NLRB No. 13) San Francisco, CA Aug. 25, 2005. Adopting the administrative law judge's recommendations, the Board held that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing One Source Building Services to discharge Mumar Abdo Alhanshali, causing Metro Maintenance, Inc. to discharge Hugo Brolyn, and refusing to permit Brolyn to obtain work through its exclusive hiring hall. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber rejected the General Counsel's exception to the judge's failure to find that Business Agent Oscar Romero interrogated employee Manuel Juarez. They relied on the fact that the judge specifically discredited Juarez' testimony that Romero threatened him and, contrary to dissenting Member Liebman's implication, that the General Counsel did not except to that dismissal or to the credibility resolution upon which it was based. Chairman Battista and Member Schaumber also wrote that the judge relied on the strength of Romero's denial where he described Romero as "emphatically den[ying] making any such statement."

Member Liebman agreed with the judge that the evidence is insufficient to support a finding that the Respondent, by Romero, threatened to refuse to dispatch from the hiring hall

anyone signing a petition to decertify it. In dismissing the allegation, she would find that the evidence regarding the threat was in equipoise and thus the General Counsel did not carry his burden of persuasion. *Promedica Health Systems, Inc.*, 343 NLRB No. 131, slip op. at 28 (2004). Therefore, Member Liebman would not find that the judge implicitly discredited Juarez' testimony that Romero interrogated employees regarding the decertification petition. She noted the Board has long held that a fact-finder's failure to credit part of a witness' testimony does not preclude crediting other parts of his testimony. Because the judge did not address Juarez' testimony regarding the interrogation, Member Liebman would remand this issue.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Hugo Brolyn, Mumar Abdo Alhanshali, and Manuel Juarez, Individuals; complaint alleged violation of Section 8(b)(1)(A) and (2). Hearing at San Francisco, Sept. 14, 15, and 29, 2004. Adm. Law Judge Jay R. Pollack issued his decision Dec. 8, 2004.

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*Stanadyne Automotive Corp.* (34-CA-9365; 345 NLRB No. 6) Windsor, CT Aug. 24, 2005. The Board adopted the administrative law judge's finding that by orally implementing a rule prohibiting employees from discussing the Union while on working time, the Respondent violated Section 8(a)(1) of the Act. Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated Section 8(a)(1) by issuing a statement prohibiting "harassment," by the alleged threats of plant closure, inevitability of strikes, and job loss, and by announcing improved pension benefits after the UAW filed a representation petition and before the election held on May 15, 2005. Member Liebman dissented in part. [\[HTML\]](#) [\[PDF\]](#)

In dissent, Member Liebman wrote:

The majority wrongly reversed two 8(a)(1) violations found by the judge. First, the majority finds that a statement by the Respondent's president threatening employees with reprisal for 'harassing' other employees was lawful, despite the fact that the statement was made in direct response to union activity and would reasonably tend to chill such activity. Second, the majority sees no harm in a series of statements by the Respondent's top officials that threatened employees that choosing the Union would lead to strikes, job losses, and the closure of the plant. The majority's rulings on both issues are based in part on recent decisions that retreated from well-established principles of Board law and that weakened employees' protection under the Act.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by the Auto Workers; complaint alleged violation of Section 8(a)(1). Hearing at Hartford, Aug. 15-17 and 24, 2001. Adm. Law Judge Raymond P. Green issued his decision Nov. 9, 2001.

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*TNT Logistics North America, Inc.* (7-RC-22671; 345 NLRB No. 21) Southfield, MI Aug. 26, 2005. Chairman Battista and Member Schaumber overruled Teamsters Local 299's Objections 1 and 3 and certified the results of the election. The tally of ballots for the mail ballot election held June 9-29, 2004 showed 17 votes for and 17 against the Petitioner, with no challenged ballots. [\[HTML\]](#) [\[PDF\]](#)

The unit employees are delivery drivers who work exclusively on the Employer's Home Depot account. Petitioner's Objection 1 claimed that Supervisors Mike Floyd and Chris Haynes threatened delivery driver Steve Cook with job loss if the Union was selected. During a discussion with Cook, Floyd responded that if the Union were selected, it would not be better. Haynes also volunteered that "Home Depot doesn't like the Union; that if the Union comes in we wouldn't have a job with Home Depot." The Hearing Officer found that Haynes' comments to Cook that Home Depot did not like the Union, and that employees servicing the Home Depot account would not be able to drive for Home Depot were the Union elected, exceeded the limits of an employer's protected speech.

Chairman Battista and Member Schaumber disagreed. They wrote that an employer is free to communicate to his employees any of his general views of unionism or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." Applying the standard set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), they found that Haynes' statement conveyed his personal "belief as to the demonstrably probable consequences beyond f(the Employer's) control," based on objective fact, which is permissible.

Objection 3 concerned solicitation of grievances and the implication that grievances would be remedied. Floyd asked Cook "What would make things better?" The hearing officer found the question constituted an improper solicitation of employee grievances. In disagreeing with the hearing officer, the majority found that the question was consistent with the Employer's established practice of soliciting employee concerns, a practice it had followed before the Union arrived on the scene. The majority wrote that prior to the onset of any organizational efforts by the Petitioner, the Employer maintained an open door policy, under which employees would discuss work related issues and concerns directly with management. Although there was a union organizing campaign in progress, the majority found that the Employer was entitled to utilize its established open door policy to deal with employee grievances so long as it did not expressly to implicitly promise to remedy them.

Member Liebman wrote: "[T]he majority defends the Employer's statement on grounds that actually establish that they were objectionable. Its failure to address a long line of precedent is startling. Today's decision continues an unfortunate trend of breaking with precedent to give employers greater leeway in making coercive prediction about the effects of unionization. Accordingly, I dissent and would set the election aside, based on Petitioner's Objection 1."

(Chairman Battista and Members Liebman and Schaumber participated.)

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*United States Postal Service* (16-CA-22930(P); 345 NLRB No. 25) Waco, TX Aug. 27, 2005. No exceptions having been filed, the Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act four times between May and June 2004 by failing and refusing to provide relevant information requested by Postal Workers Local 739. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Liebman agreed with the judge's recommendation to provide broad injunctive language in the Order, enjoining the Respondent from "in any other manner" violating the Section 7 rights of employees at the Waco, TX postal facility involved here. The majority wrote:

In *Hickmott Foods*, 242 NLRB 1357, (1979), the Board stated that a broad cease-and-desist order is warranted 'when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.' In this instance, we find that the Respondent's proclivity to violate the Act justifies imposition of a broad order.

Chairman Battista and Member Liebman modified the judge's recommended order by deleting the paragraph ordering that the notice be read to unit employees, by limiting application of the notice posting and conditional mailing provisions to the postal facility where the violations at issue occurred, and by deleting the paragraph ordering that the Respondent, upon request by the Union, reintroduce in the grievance procedure grievances that were lost because the Respondent did not provide requested information to the Union, and that the Respondent accord the Union the opportunity to supplement those grievances with the information the Respondent is ordered to provide the Union. Member Schaumber concurred with his colleagues on these modifications.

Contrary to his colleagues, Member Schaumber found that the Respondent's failure to adequately and/or timely respond to four of the 68 information requests submitted by the Charging Party over a two-month period does not warrant a broad order restraining the Respondent from committing "any" conceivable violation of the Act at its Waco facility. In his view, the failure to respond to several information requests in violation of a single subsection of Section 8(a) does not meet the stringent *Hickmott* standard. He would, instead, use a cease-and-desist order for "such" violations found.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Postal Workers Local 739; complaint alleged violation of Section 8(a)(1) and (5). Hearing on May 27, 2004. Adm. Law Judge John H. West issued his decision July 29, 2004.

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*Utility Vault Co., a div. of Oldcastle Precast, Inc.* (31-CA-26812; 345 NLRB No. 4) Fontana, CA Aug. 22, 2005. In affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain collectively with Teamsters Local 848 as the exclusive bargaining representative of unit employees by unilaterally implementing changes in their terms and conditions of employment; and violated Section 8(a)(1) by requiring employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment, and to the extent that such waivers apply to the filing of Board charges. [\[HTML\]](#) [\[PDF\]](#)

The Board agreed with the judge that the Respondent was obligated to bargain with the Union over the implementation of the Dispute Resolution Process (DRP) agreement, which requires that employees arbitrate claims involving their terms and conditions of employment, including wrongful termination and the failure to pay wages and benefits. Because the arbitration of such claims is a mandatory subject of bargaining, it found that the Respondent's unilateral implementation of the DRP agreement violated Section 8(a)(5) and (1). In addition, the Board held that by requiring employees to sign the agreement as a condition of employment, the Respondent engaged in direct dealing and undermined the Union's position as the employees' exclusive bargaining representative.

Chairman Battista agreed with his colleagues that the Respondent violated Section 8(a)(5), and violated Section 8(a)(1) derivatively, by unilaterally requiring new employees to sign the DRP agreement as a condition of employment without bargaining with the Union, and by bypassing the Union. He found it unnecessary to pass on whether the Respondent also violated Section 8(a)(1) based on the asserted requirement to forego access to the Board because such a finding would have no material effect on the remedy.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 848; complaint alleged violation of Section 8(a)(1) and (5). Hearing waived. Adm. Law Judge Jay R. Pollack issued his decision April 5, 2005.

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*Werthan Packaging, Inc.* (26-RD-1104; 345 NLRB No. 30) Nashville, TN Aug. 26, 2005. Chairman Battista and Member Schaumber, Member Liebman dissenting, overruled the Union's (PACE) Objections 1, 2, and 14 and certified the results of the election. The tally of ballots for the election held on Nov. 17-18, 2004, showed 92 votes for and 113 against the Union (PACE), with 3 challenged ballots, an insufficient number to affect the results. [\[HTML\]](#) [\[PDF\]](#)

The Union's Objection 1 alleged that the Employer threatened job loss if the Union won the election; Objection 2 alleged that the Employer interrogated employees concerning their membership and activities on behalf of the Union; and Objection 14 alleged that the Employer threatened and coerced employees because of Union activities and threatened dire consequences if the employees selected the Union.

The hearing officer found that the Employer engaged in objectionable conduct that could affect the outcome of the election and, therefore, sustained the objections at issue here. He found that Night Shift Supervisor Jethro Martin engaged in objectionable conduct by interrogating employee Geraldine Graham and by threatening her with job loss if the Union won the election, and by interrogating employees Ricky Golden, Marcus Bostick, and Gene Newby about their union sympathies. Further, the hearing officer found that Converting Manager Carlos Adkisson's remark to employee Felisa Stokes (that it was in Stokes' and her family's best interest to vote "no") was threatening and coercive. The hearing officer further stated that Stokes observed Adkisson walk to another employee and then wrote some on the clipboard and repeat this process with about 25 employees.

Contrary to the hearing officer, the majority found no evidence that the employees who were interrogated or the one who was threatened disseminated those acts to other employees. They concluded that the record does not establish that the Employer's conduct affected a determinative number of employees, or that it was otherwise so pervasive as to warrant a new election.

Member Liebman agreed with the hearing officer's finding that Adkisson unlawfully interrogated Stokes, threatened her, and then went on to interrogate 25 other employees. Dissenting in part, she wrote:

The majority's failure to set aside the election here, based on the conduct of supervisor Carlos Adkisson, raises questions about whether the Board now applies a double standard: one for prounion supervisory conduct and one for antiunion supervisory conduct. The majority assumes, but does not find, that Adkisson impermissibly interrogated employees Alisa Stokes about her support for the Union. It finds, erroneously, that Adkisson did not also threaten Stokes (choosing curiously, to decide this issue, while not deciding the interrogation issue). Finally, the majority refuses to infer that Adkisson interrogated 25 other employees, whom he approached immediately after interrogating Stokes, speaking to them and writing something down on a clipboard—just as he had with Stokes. The majority's approach stands in sharp contrast to the Board's recent decision in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004). There, the majority inferred that a prounion supervisor threatened certain employees, based on the supervisor's statements to other employees.

In conclusion, Member Liebman wrote that consistent with *Harborside*, Adkisson's conduct requires setting aside the election in this case. She said it affected not 5 employees, as the majority finds, but 30—far more than needed to change the outcome of the election, which was decided by 21 votes. She further noted that "Our law with respect to antiunion supervisory conduct must be no less strict than our law with respect to prounion supervisory conduct."

No exceptions having been filed, the Board adopted the hearing officer's recommendation to overrule the Union's Objections 4, 5, 6, 9, 11 and 12, and parts of Objections 1 and 4.

(Chairman Battista and Members Liebman and Schaumber participated.)

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*Zurn/N.E.P.C.O.* (7-CA-33443, et. al.; 345 NLRB No. 1) Cadillac, MI Aug. 22, 2005. The administrative law judge found, in a series of three decisions, that the Respondent violated Section 8(a)(1) of the Act on numerous occasions by threatening and interrogating employees and applicants for employment, by prohibiting employees from wearing union insignia, and by enforcing a no-solicitation rule in a discriminatory manner. The judge also found that the Respondent violated Section 8(a)(3) by laying off its pipefitting crew because they engaged in union organizing activities. Applying the principles set out by the Board in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), the judge in his second supplemental decision further found that the Respondent violated Section 8(a)(3) by discriminating in hiring against applicants with union backgrounds. [\[HTML\]](#) [\[PDF\]](#)

The Board agreed with all of the Section 8(a)(1) violations found by the judge except that Chairman Battista and Member Schaumber disagreed with his finding that the Respondent operated its entire hiring process in a discriminatory manner. They also found no merit to the allegation that the Respondent violated Section 8(a)(3) by refusing to consider the union applicants, in addition to refusing to hire them.

Instead of accepting direct applications for jobs at its Cadillac, Michigan project, the Respondent entered into an arrangement with a State agency, the Michigan Employment Security Commission (MESC), to register applicants for jobs at the project and to process their applications. Under the regular MESC job-placement procedure, applicants registered for jobs by going to the MESC office and filled out a MESC registration form listing their job skills and work experience. MESC officials would interview the applicants and enter the information on a computer. Employers could then request MESC to refer registrants with appropriate job skills, and the MESC computer would generate a list of registrants (in order of their expressing an interest in working for a particular employer, or of their registration dates).

The Respondent, however, came to a special arrangement with MESC called a "custom referral agreement" which, instead of referring qualified individuals to the Respondent in the order in which they registered, MESC agreed to honor Respondent's priority hiring system. Known as policy 303, the system gives priority in hiring to qualified applicants who are present or former employees of the Respondent, or who have appropriate work experience and have been referred by current managers, supervisors, or employees of the Respondent. Thus, MESC would register individuals with priority under policy 303 and refer them to the Respondent on a "name call" basis ahead of other, nonpriority registrants.

Contrary to the judge who found that Respondent's policy 303 to be inherently discriminatory, the majority found that policy 303 does not, either by its terms or by its necessary operation, discriminate in hiring among individuals on the basis of union membership or nonmembership and "does not on its face preclude or limit the possibilities for consideration of applicants with union preferences or backgrounds."

Dissenting in part, Member Liebman concluded:

The majority correctly finds that Zurn discriminated in every instance where it deviated from its priority hiring policy or demonstrated antiunion animus against specific applicants. But the record compels the much broader finding that Zurn violated Section 8(a)(3) each time it hired a nonunion applicant, instead of a qualified union applicant, after June 1992 when the union organizing campaign began. The majority . . . finds individual, seemingly isolated, instances of discrimination against union job applicants, but misses the obvious: that Zurn/N.E.P.C.O. manipulated its entire hiring process to avoid hiring qualified union applicants—who were readily available, in large numbers—in order to avoid the unionization of the Cadillac, Michigan project.

The issues considered by the Board in this proceeding arose from efforts by several building trades unions to organize the Cadillac, Michigan worksite of the Respondent, and from Respondent's actions in opposition to those efforts.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Northern Michigan Building & Construction Trades Council; complaint alleged violation of Section 8(a)(1) and (3). Adm. Law Judge Karl L. Buschmann issued his decision Oct. 27, 1995; supplemental decision Feb. 24, 1997; and second supplemental decision Sept. 6, 2001.

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#### **LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES**

*Southwest Regional Council of Carpenters Locals 803 and 1506* (Ritchie's Insulation Inc.) Los Angeles, CA August 22, 2005. 21-CC-3337, et al.; JD(SF)-59-05, Judge John J. McCarrick.

*Noble Metal Processing, Inc.* (an Individual) Warren, MI August 25, 2005. 7-CA-48054; JD(ATL)-37-05, Judge Margaret G. Brakebusch.

*Pan American Grain Co.*, (Congreso de Uniones Industriales de Puerto Rico) San Juan, PR August 26, 2005. 24-CA-10014; JD(ATL)-39-05, Judge Michael A. Marcionese.

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**NO ANSWER TO COMPLAINT**

*(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)*

*Security Guards Local 225* (Service Employees Local 32B-32J) (2-CB-18738-1; 345 NLRB No. 18) Fairfield, NJ August 26, 2005. [\[HTML\]](#) [\[PDF\]](#)

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**NO ANSWER TO COMPLIANCE SPECIFICATION**

*(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the compliance specification.)*

*Jet Electric Co.* (Service Employees SEIU Local 342) (11-CA-18395; 345 NLRB No. 7) Winston-Salem, NC August 23, 2005. [\[HTML\]](#) [\[PDF\]](#)

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**TEST OF CERTIFICATION**

*(In the following cases, the Board granted the General Counsel's motion for summary judgment on the ground that the Respondent has not raised any representation issue that is litigable in the unfair labor practice proceeding.)*

*DynCorp.* (Postal Workers Local 164) (9-CA-42012; 345 NLRB No. 9) West Chester, OH August 24, 2005. [\[HTML\]](#) [\[PDF\]](#)

*Mickey's Linen and Towel Supply Inc., d/b/a Domestic Linen and Uniform* (33-CA-14877; 345 NLRB No. 5) Kankakee, IL August 23, 2005. [\[HTML\]](#) [\[PDF\]](#)

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**LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS  
IN REPRESENTATION CASES**

*(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)*

**DECISION AND DIRECTION [that Regional Director  
open and count challenged ballots]**

*Hialeah Hospital*, Hialeah, FL, 12-RC-8398 August 23, 2005 (Chairman Battista and Members Liebman and Schaumber)

*Pacific Elevator Corp.*, Honolulu, HI, 37-RM-178, August 23 2005 (Chairman Battista and Members Liebman and Schaumber)

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

*Entergy Operations, Inc.*, St. Francisville, LA, 15-RC-8605, August 25, 2005  
(Chairman Battista and Members Liebman and Schaumber)

**DECISION AND ORDER REMANDING [to Regional Director  
for further appropriate action]**

*Entergy Operations, Inc.*, St. Francisville, LA, 15-RC-8606, August 26, 2005  
(Chairman Battista and Member Schaumber; Member Liebman dissenting)

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*(In the following cases, the Board denied requests for review  
of Decisions and Directions of Elections (D&DE) and  
Decisions and Orders (D&O) of Regional Directors)*

*MVM, Inc.*, Vienna, VA, 5-RC-15873, August 24, 2005 (Chairman Battista and  
Members Liebman and Schaumber)

*Professional Security Bureau, LLC, an Affiliate of Allied Barton Security Service*  
New York, NY, August 24, 2005 (Chairman Battista and Members Liebman  
and Schaumber)

*Saks Fifth Avenue*, New York, NY, 2-RD-1519, August 24, 2005 (Chairman Battista and  
Members Liebman and Schaumber)

*Mountain States Sheet Metal Co.*, Pueblo, CO, 27-RM-667, August 25, 2005  
(Chairman Battista and Member Schaumber; Member Liebman dissenting)  
[remanding to Regional Director for appropriate action]

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***Miscellaneous Board Orders***

**ORDER [granting review with respect to whether the contract between  
the Employers and Intervenor is governed by Section 9(a) or  
Section 8(f) and denying in all other respects]**

*J.D. Consulting, LLC d/b/a Donaldson Traditional Interiors*, Brooklyn, NY,  
29-RC-10336, August 24, 2005 (Chairman Battista and Members Liebman  
and Schaumber)

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